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CHARLES ELMORE DROPLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

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No. 1284
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STANLEY J. KLEIN, 
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT, AND BRIEF IN SUP-
PORT THEREOF.**

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Stanley J. Klein respectfully shows to this honorable court:

(A)

Summary Statement of the Matter Involved.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in the advance sheets 154 F. 2d 58.

The controversy which the petitioner now brings to this court involves a deficiency in income tax for the calendar year 1941 in the amount of \$6,173.60, resulting from holding the income of a trust created by petitioner taxable to him under section 22(a) of the Internal Revenue Code.

In 1941 the corpus of the trust consisted of 6% debentures of Empire Box Corporation, of which petitioner was president and a director. The trustees were the petitioner and Charles W. Stiefel, Jr., who was counsel for a related corporation in which petitioner was interested.

The pertinent provisions of the trust agreement and the trust thereby created are as follows:

The trust is irrevocable and unamendable. Under no circumstances can the income or principal vest in the petitioner or be used for his benefit.

The income of the trust is to accumulate for twenty years, or until the death of the first to die of petitioner and his wife, whichever of such periods is shorter. Thereafter the income is to be distributed currently to petitioner's wife, if alive, or to such persons as he may designate from time to time. If his wife dies he may likewise designate the income beneficiaries, and in default of designation, the income is to be distributed to his brother.

The trust terminates on the death of the survivor of petitioner and his wife unless, at the time of petitioner's death, his wife is not a beneficiary, in which case it terminates on petitioner's death. Upon termination the corpus together with the accumulated income is distributable as petitioner directs (other than to himself or for his benefit), either during his lifetime or by will, and in default of such designation is to be distributed to his brother.

The income of the trust for the taxable year 1941 was \$8,947.24. The Commissioner of Internal Revenue determined that such income was taxable to petitioner under section 22(a) of the Internal Revenue Code. A petition for redetermination of the deficiency as set forth by the Commissioner was filed with the Tax Court of the United States. The Tax Court in its findings of fact and opinion sustained the determination of the Commissioner.

The Circuit Court of Appeals for the Third Circuit on appeal affirmed the decision of the Tax Court on the sole ground that it was not at liberty to review the decision of the Tax Court under the rule of *Dobson v. Commissioner* (1943), 320 U. S. 489, and *The John Kelley Company v. Commissioner* (Jan. 7, 1946), 326 U. S. _____, 90 L. ed. Adv. Op. 257. A petition for rehearing was denied.

(B)

Jurisdictional Statement.

Jurisdiction is conferred by Section 240(a) of the Judicial Code as amended by Act of Feb. 13, 1925 (28 U. S. C., Sec. 347(a)).

The judgment of the Circuit Court of Appeals for the Third Circuit affirming the order of the Tax Court was entered on February 25, 1946.

A petition for rehearing was filed in due time and upon consideration was denied on March 26, 1946. This petition is filed within three months thereafter as prescribed by the Act of Feb. 13, 1925, Ch. 229, Sec. 8, 43 Stat. 940 (28 U. S. C., Sec. 350).

(C)

Questions Presented.

(1) Is a finding of the Tax Court that petitioner was the owner of the income of an irrevocable trust created by him a finding of fact which precludes review by the Circuit Court of Appeals under the rule of *Dobson v. Commissioner*?

(2) As a matter of law was petitioner taxable under section 22(a) of the Internal Revenue Code on the income, for the year 1941, of an irrevocable trust created by him

where the trust income had to be accumulated for a period of twenty years and petitioner retained only the power to designate the beneficiary (himself excluded) of the income to be received by the trust *after* the accumulation period, and of the corpus including the accumulated income, but retained no control over current income?

(3) As a matter of law did the powers exercisable by petitioner give him the attributes of ownership necessary to cause the income of the trust to be taxed to him?

(4) As a matter of law did petitioner's reserved right to change the beneficiaries from those originally named (other than to himself or for his benefit) who will receive the income accruing after the expiration of the accumulation period, and of the corpus including the accumulated income, make him in substance the owner of the income during the period in which it must be accumulated?

The Circuit Court of Appeals for the Third Circuit answered the first question adversely to petitioner, and gave no consideration to the other questions.

(D)

Reasons Relied On For Allowance of Writ.

(1) The effect of the decision of the Circuit Court of Appeals in this case is to give finality to Tax Court decisions involving taxability of income under section 22(a) of the Internal Revenue Code far beyond the intendment of the Supreme Court under the rule of *Dobson v. Commissioner*.

(2) There is utter confusion among the Circuit Courts of Appeals in applying the *Dobson* rule to cases involving the taxability of the grantor of a trust under section 22(a) of the Internal Revenue Code. The extent of this confusion is shown in part (B) of the argument in the brief.

(E)

Prayer for Writ.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals for the Third Circuit, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the said judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this honorable court, and for such further relief as to this court may seem proper.

LEONARD M. RIESER,
Counsel for Petitioner.

SIDNEY M. PERLSTADT,
Of Counsel.



BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in the advance sheets in *Stanley J. Klein v. Commissioner of Internal Revenue*, 154 F. 2d 58.

II.

Statement of the Case.

The material facts with reference to the origin and history of the case, jurisdiction, and the issues and questions presented have been stated in the preceding petition.

III.

Specification of Errors to be Urged.

- (1) The Circuit Court of Appeals erred in affirming the order of the Tax Court.
- (2) The Circuit Court of Appeals erred in refusing to review the decision of the Tax Court in the mistaken belief that *Dobson v. Commissioner* does not permit review.
- (3) The Circuit Court of Appeals erred in not reversing and directing that petitioner was not taxable on the income of the trust.

IV.

ARGUMENT.

(A)

The effect of the decision of the Circuit Court of Appeals in this case is to give finality to Tax Court decisions involving taxability of income under section 22(a) of the Internal Revenue Code far beyond the intendment of the Supreme Court under the rule of *Dobson v. Commissioner*.

In *Helvering v. Clifford* (1940), 309 U. S. 331, 84 L. ed. 788, the grantor of a short-term trust was held taxable on its income under section 22(a) of the Internal Revenue Code, 26 U. S. C., Sec. 22(a), and in *Dobson v. Commissioner* (1943), 320 U. S. 489, 88 L. ed. 248, this court defined the scope of appellate review of Tax Court decisions.

The questions here involved will call for this honorable court's authoritative pronouncement—nationwide in effect and scope—of the extent to which the *Dobson* rule is applicable to cases involving the *Clifford* doctrine. In the case at bar there was no dispute as to the facts, but the question of law, as the Tax Court itself admitted, was both novel and difficult. But, the Circuit Court of Appeals held that the finding of the Tax Court that petitioner was in reality the owner of the trust income during the taxable year, although "a conclusion drawn by the Tax Court from the evidential facts" was one which it was not at liberty to review, and gave no consideration to this novel and difficult question of law. This decision would preclude Circuit Courts of Appeals from determining whether or not the Tax Court has correctly applied the law and would bind them by conclusions of the Tax Court without any

consideration of the facts. The Tax Court would become the final court of review of all issues arising under the *Clifford* case and in fact under section 22(a) generally.

Because section 22(a) is very general in its terms and is substantially as broad as the sixteenth amendment itself, the determination that something received constitutes income or that one person's income is taxable to another is clearly the legal question to be decided. If a "finding" by the Tax Court determines this question and is not reviewable, no case arising under section 22(a) could be reviewed.

The decision thus raises squarely the extent of the application of the *Dobson* rule to cases arising under section 22(a) of the Internal Revenue Code.

This court has never mechanically applied the *Dobson* rule in such cases, but has reviewed the legal questions involved. In *Commissioner v. Court Holding Company* (1945), 324 U. S. 331, 89 L. ed. 981, *Commissioner v. Smith* (1945), 324 U. S. 177, 89 L. ed. 830, and *Commissioner v. Tower* (Feb. 25, 1946), _____ U. S. _____, 90 L. ed. Adv. Op. 559, the court examined the evidence for the purpose of determining whether the facts were sufficient to support the finding, considered the legal principles, and then decided that the Tax Court had correctly applied such principles. In *Commissioner v. Wilcox* (Feb. 25, 1946), _____ U. S. _____, 90 L. ed. Adv. Op. 553, this court after examining the facts and legal principles concluded that the Tax Court had made a clear cut mistake of law and reversed the Circuit Court of Appeals which had affirmed the Tax Court. It is difficult to see why the *Dobson* rule precludes review of the taxability of income of a trust but permits review of the taxability of embezzled funds, since both arise under section 22(a) of the Internal Revenue Code.

Moreover, the court has recently limited the application of the *Dobson* rule to a far greater extent than that here contended for. In *Burton Sutton Oil Co., Inc. v. Commissioner* (Apr. 22, 1946), U. S., 90 L. ed. Adv. Op. 801 although a different section of the code was involved, this court reversed the Circuit Court of Appeals, which had affirmed the Tax Court, and limited the application of the *Dobson* rule by reviewing the legal principles involved even though the Tax Court had not, in the opinion of the Supreme Court, made a clear cut mistake of law. The concurring opinion of Mr. Justice Frankfurter clearly recognizes the failure of the court to follow the *Dobson* rule to the extent here asserted by the Circuit Court of Appeals.

The Circuit Court of Appeals in its refusal to review the Tax Court decision applied the *Dobson* rule to an extreme far beyond the intendment of this court.

(B)

There is utter confusion among the Circuit Courts of Appeals in applying the *Dobson* rule to cases involving the taxability of a grantor of a trust under section 22(a) of the Internal Revenue Code.

The Circuit Courts of Appeals have experienced great difficulty in properly applying the *Dobson* rule to cases involving the taxability to the grantor of the income of a trust under the doctrine of *Helvering v. Clifford, supra*. Their decisions have been in hopeless conflict and even a single circuit has been unable to follow a consistent policy in its application.

The Second Circuit, in *Hyman v. Nunan* (1944), 143 F. 2d 425, in affirming the Tax Court decision, discussed the legal principles involved and then, apparently as an after-thought, applied the *Dobson* rule. But, in *Cushman v. Commissioner* (1946), 153 F. 2d 510, the same court, after

reviewing the legal questions involved, reversed the Tax Court, stating that whether or not a particular characteristic in the relationship of the grantor to the trust may be treated as an "element of control" within the *Clifford* doctrine is a problem of "general application," reviewable under *Dobson v. Commissioner, supra*. Finally, in *Nelson Littel v. Commissioner* (Apr. 9, 1946), F. 2d , C. C. H. 1946 Standard Federal Tax Reporter, p. 12,436, the same court affirmed the Tax Court decision, stating (p. 12,436) :

"The answer of the Tax Court must always be accepted anyway. *The John Kelley Company v. Commissioner* and *Talbot Mills v. Commissioner*, 326 U. S. However, so far as we can ascertain, we still have a theoretical responsibility, however vestigial, and for that reason it has seemed to us proper to discuss the merits."

The Third Circuit, in *Foerderer v. Commissioner* (1944), 141 F. 2d 53, reviewed the legal principles involved and affirmed the Tax Court without even discussing the *Dobson* rule. In the case at bar the same court refused even to consider the legal principles on the ground that *Dobson* precluded such review.

The Fourth Circuit, in *Hash v. Commissioner* (1945), 152 F. 2d 722, applied the *Dobson* rule after a discussion of the merits of the case.

The Fifth Circuit, in *Hawkins v. Commissioner* (1945), 152 F. 2d 221, reversed the Tax Court decision without even discussing the *Dobson* rule.

The Sixth Circuit, in *Miller v. Commissioner* (1945), 147 F. 2d 189, reviewed the legal principles and used *Dobson* as an additional reason for affirming the Tax Court. The same court, however, in *Steckel v. Commissioner* (1946), 154 F. 2d 4, determined the question on its merits without discussing the applicability of the *Dobson* rule.

The Eighth Circuit, in *Stockstrom v. Commissioner* (1945), 148 F. 2d 491, *Edison v. Commissioner* (1945), 148 F. 2d 810, *Funsten v. Commissioner* (1945), 148 F. 2d 805, and *George v. Commissioner* (1944), 143 F. 2d 837, although discussing in great detail the legal questions involved, affirmed the Tax Court under the *Dobson* rule.

The Tenth Circuit, in *Armstrong v. Commissioner* (1944), 143 F. 2d 700, and in *Hall v. Commissioner* (1945), 150 F. 2d 304, reversed Tax Court decisions and held that the *Dobson* rule did not apply because the finding of the Tax Court that the grantor of the trust was in substance the owner of the trust property was not a finding of fact but a conclusion of law.

We have limited this discussion of the conflicts of the different Circuit Courts of Appeals in applying the *Dobson* rule to cases arising under the *Clifford* doctrine. Similar conflicts have arisen in its application to section 22(a) cases generally and to other cases arising under other sections of the code.

We submit that there is an urgent need for this court to bring order out of this chaos, so that there will be uniform administration of the revenue laws in such cases.

Conclusion.

We respectfully submit that the questions presented by this petition are of nationwide importance and of far reaching consequences, making them worthy of this honorable court's deliberation and determination.

Respectfully submitted,

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Counsel for Petitioner.

Of Counsel:

SIDNEY M. PERLSTADT.

End

